***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF & APPENDIX

76-1304

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

v. :

ELIZABETH JANE YOUNG CHEN, :

Defendant-Appellant. :

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On appeal from the United States District Court for the Eastern District of New York

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# APPELLANT'S BRIEF AND APPENDIX

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# BRIEF FOR APPELLANT

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## PRELIMINARY STATEMENT

This case is before the Court on an interlocutory appeal predicated on grounds of double jeopardy and collateral estoppel. The appeal was filed on the Friday before the Monday that the second trial commenced on June 21, 1976. The trial court (Judge Jacob Mishler) and this Court denied appellant a stay of the trial pending appeal. The case then proceeded to a verdict of guilty on two counts of an eight count indictment charging violation of 18 U.S.C. §922 (a) 3, which proscribes, as part of the Omnibus Crime and Safe Streets Law of 1968, the transportation of a weapon into a state where a person resides from outside the state.

Defendant-appellant Elizabeth Jane Young Chin (hereafter "Young") is scheduled to be sentenced along with her husband, co-defendant Kenneth Chin (hereafter "Chin") on September 17, 1976 by Judge Mishler in the United States Court for the Eastern District of New York.

## ISSUES PRESENTED

1. Whether the trial court's striking all the evidence concerning one of four weapons on the grounds of failure of proof prior to submission of the case to a jury did not bar on grounds of double jeopardy a subsequent prosecution on the same charge for the same weapon.

2. Whether a jury verdict of not guilty on conspiracy to violate a provision of the gun control law barring transportation of weapons did not bar,

(a) on grounds of collateral estoppel admission in a subsequent prosecution of evidence of joint criminal involvement with another and other specific issues necessarily decided by the prior acquittal and/or

(b) on grounds of double jeopardy, a subsequent prosecution of the substantive charge, predicated on the same evidence.

## FACTS BELOW

Defendant Young was indicted along with defendant Chin on November 11, 1975 in the Eastern District of New York on a

two-count indictment charging: (1) Conspiracy to violate Title 18 U.S.C. §922 (a) 3, and (2) the substantive violation of the same section. The law at issue proscribes the importation by one, not specifically licensed, of any firearm obtained from without the state into a state where the importer resides.

Under count one, the conspiracy count, the overt acts alleged were:

(1) The purchase by defendant Young of a firearm Serial No. S-12585 from a California sporting goods store on July 29, 1975.

(2) The possession by both defendants Young and Chin at their apartment in Brooklyn, New York on October 4, 1975 of four firearms, Serial numbers 5487136, 89474, S-12585 and S-12590.

Count one, the conspiracy count, charged that the defendants Young and Chin knowingly and wilfully conspired to transport the firearms above described from Los Angeles, California to Brooklyn, New York, where they were alleged to reside between July 29, 1975 and October 4, 1975, in violation of the statute.

Count two charged both defendants with knowingly and wilfully transporting the same-described weapons from California to Brooklyn, New York, where they resided, in violation of the statute (A-7-9).[1]

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1. References to the Appendix are to A- and page number; to the two trial transcripts by I followed by page number for the first trial and by II followed by page number for the second trial.

The case of defendant Young was severed from that of the co-defendant Chin and she was tried alone on April 12, through April 16, 1976. The government adduced the same, or substantially the same evidence to support both counts of the indictment. That evidence, briefly summarized, involved proof that the defendant Young lived with the defendant Chin (to whom she was not then married) at 925 Union Street, Brooklyn, New York from sometime in 1974 through the present time (I 90). Defendant Young had a Los Angeles, California, address which she changed through the post office to an address in New York in 1974 (I 81). Defendant Young purchased one of the weapons (an Armalite 180 Serial No. S-12585) at a sporting goods store near Los Angeles in July 1975 using a valid California driver's license for identification (I 43, 46, Ex. 6). It bore the prior Los Angeles, California address. There was other evidence that two of the other three weapons were purchased by defendant Young in August 1975 in California (Serial Nos. 5487136 and 89474). The government introduced conflicting evidence that the two weapons had been purchased by the defendant Chin -- one in July 1975, the other in August 1975 -- from the same person who said he sold them to the defendant Young (I 227, 232, Ex. 16; 239, 245, Ex. 14; I 248-250, Ex. 15). Evidence concerning the fourth weapon (AR 180 rifle S-12590) was adduced to the effect that it was purchased in California by another person, Mark Choyei Kondo, otherwise unidentified, and not connected up with either defendant (I 50, 52, Ex. 7).

Defendant Young presented a defense through the testimony of three witnesses, one of whom was her father. She contended that in early July 1975 she had a quarrel with Mr. Chin with whom she had been living and she returned to California to her parent's home in Hanford intending to start a new life and resume her California residence and give up her Brooklyn residence in New York with Mr. Chin (I 340). Her father testified to her telling him of the quarrel, her intention to live in California, and that she applied for unemployment insurance and looked for employment in California (I 340, 341). She presented further testimony that Mr. Chin remained in New York (I 325). It was not until she returned to New York sometime in the middle or late in August, 1975, that she changed her mind about her residence and decided to move back to New York (I 342).

She also presented evidence, controverted by the government by evidence that at least two of the four weapons were "military" weapons, that she had a legitimate interest in weapons as a hunter and that she shared that interest with the co-defendant who was now her husband (I 173, 325).

At the end of the case (after the conclusion of the government's opening summation and the summation of defense counsel) the trial court, on its own motion, struck all the evidence concerning one of the four weapons and directed the jury to disregard such evidence "on the grounds that the government had failed to prove that Young had transported the weapon to New

York."[2] (I 505) That weapon was involved in the "Kondo" sale (S-12590).

At the conclusion of the case on April 15, 1976 the jury found the defendant Young not guilty on count one, the conspiracy count (I 607). It was unable to agree on count two and a mistrial was declared by the court on that count on April 16, 1976 (I 630).

On April 19, 1976, the government filed a superseding indictment as to both defendants Young and Chin. That indictment was an eight-count indictment, again charging violation of 18 U.S.C. §922 (a) 3 as to each of the four weapons involved in the original indictment. As to each weapon, the counts were divided and the defendants charged jointly as before with knowingly and wilfully transporting and,in addition, with receiving each weapon in violation of 18 U.S.C. §922 (a) 3 during a period which extended from July 29, 1975 to October 4, 1975 -- the same period of time as alleged in the prior conspiracy count on which defendant Young was acquitted (A-10-14).

Defendant Young duly moved to dismiss the superseding indictment on the grounds of double jeopardy and collateral estoppel. The motion was denied by the trial court on the eve of the trial. The trial court also denied a motion for a stay of the proceedings after a notice of appeal to this Court was filed. This Court also denied a stay and the trial proceeded. At the trial

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2. This was the precise language of the court in an opinion denying defendant Young's motion to dismiss on grounds of double jeopardy/collateral estoppel (A- ).

(this time both Young and Chin) which commenced on June 21, 1976, the motion was renewed and counsel for defendant Young was told that all objections on evidence and otherwise on the double jeopardy/collateral estoppel issue were preserved for an appeal (II 26, 27, 116, 434).

The case against the two defendants was substantially the same as that made out by the government against defendant Young at the prior trial. The same theory was advanced: that three of the four weapons were found in the Brooklyn apartment they both occupied on October 4, 1975 (II 96, 99, 101); that defendant Young purchased the AR 180 (S 12585) at Coles Sporting Goods on July 29, 1975 (II 105, Ex. 6); that records showed the Brooklyn address to be the residence of Young and Chin from sometime in 1974 continuously to the time of the trial (II 210, 226). Witnesses Michael Yanagita and Marc Choyei Kondo were called by the government and refused to testify. Evidence of Mr. Kondo's purchase of one of the AR 180 weapons (S 12590) at Coles Sporting Goods Store in California on August 12, 1975, was again introduced in evidence (II 114, Ex. 7) and this time the government introduced into evidence an address book found in defendants' apartment on October 4, 1975, pursuant to a search warrant, which contained Mr. Kondo's name and California address (II 192, 193, Ex. 23).

At the second trial the court attempted to exclude all references to the defendants as hunters (II 63, 64, 285, 286).

Although evidence did come in on this issue, the jury was instructed to disregard it (II 677, 678). Similarly, the court ruled that evidence as to a disagreement or quarrel between the two defendants in July 1975 was irrelevant to any of the issues of the case and barred that evidence, despite the prior finding by a jury that such a fight must have taken place and that the two accordingly had no agreement between themselves to import weapons from California to New York whether or not defendant Young had, in fact, changed her residence from New York to California (II 499-501).

At the end of the trial, the court dismissed counts two, four, six and eight against defendant Young[3] (II 741). The jury found her guilty on counts one and three (transporting the two AR 180 weapons) and not guilty on counts five and seven (II 845). The jury found the defendant Chin guilty on counts one, two, three and four and not guilty on counts five, six, seven and eight[4] (II 845, 846).

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3. The court decided that under Milanovich v. United States, 365 U.S. 551 (1961) a defendant could not be charged as a principal in both the illegal transportation and receipt of weapons.

4. Counts five through eight involved the transportation of weapons obtained allegedly from Michael Yanagito who had refused to testify. At the prior trial he had similarly refused but a written statement of Yanagito had been admitted into evidence, pursuant to stipulation between the government and defense counsel.

## POINT I

THE COURT'S RULING THAT THE GOVERNMENT HAD FAILED IN ITS PROOF AS TO ONE WEAPON AND ITS STRIKING THE EVIDENCE AS TO THAT WEAPON ON BOTH THE CONSPIRACY AND THE SUBSTANTIVE COUNTS WAS AN ACQUITTAL OF THE DEFENDANT; THE GOVERNMENT WAS BARRED ON DOUBLE JEOPARDY GROUNDS FROM THEREAFTER REINDICTING AND RETRYING THE DEFENDANT.

At the end of the case against defendant Young -- after both the government and the defense had summed up -- the court on its own motion struck all the evidence on the "Kondo sale" -- a sale of an AR 180 (S 12590) to Mark Choyei Kondo at the Coles Sporting Goods Store in California on August 12, 1975, and directed the jury not to consider it. That same weapon was one of the three found in defendants Young's and Chin's residence in Brooklyn on October 4, 1975, when their apartment was searched and they were arrested.

The colloquy which accompanied the striking of the evidence was as follows:

> "The Court: I don't know how it helps the government's case to keep that evidence in, when all the government has to do is prove that a weapon was brought in. . . .
>
> "Mr. Levin Epstein [for the government]:. . . I can't honestly say that the government relies on that weapon for its proof. The government will stand on any of the weapons for its proof." (I 495)
>
> "The Court: I don't think it's [the evidence as to the 'Kondo' weapon] necessary. It may very well place a guilty verdict in jeopardy. I think it's a close question." (I 496)
>
> "The Court: . . . I'm telling the jury I'm striking all the testimony and exhibits concerning the

> transaction and sale by Copeland or Coles Sporting Goods to Mark Choyei Kondo . . . [as] unrelated to the charge in the indictment." (I 503, 505)

Thus the court told the jury to disregard all the evidence which concerned the "Kondo" weapon transaction and in so doing removed the issue from the jury's consideration. In its opinion rejecting the double jeopardy contention, the court said it struck the evidence "on the ground that the government had failed to prove that Young had transported the weapon into New York". The court further stated, however, that its ruling was "evidentiary . . . only" and "did not determine the guilt or innocence of Young with respect to the crimes charged" (A-17). Nonetheless the ruling took the issue away from the jury and was a finding of no evidence against defendant Young on that issue. And the court, itself, effectively acquitted the defendant of any crime, i.e., conspiracy and/or the substantive violation of 18 U.S.C. §922 (a) 3 despite its express language that it had made no finding on that issue.

As it appears from the excerpts from the record above, neither the court nor the government regarded the charge involving the "Kondo" weapon as necessary for conviction since each count (the conspiracy [Count I] and the substantive charge [Count II) concerned three other weapons.

This Court has most recently written on this issue in United States v. Jenkins, 490 F.2d 868 (2 Cir. 1973) affd. 420 U.S. 358 (1974), and in United States v. Velasquez, 490 F.2d 27

(2 Cir. 1973) cert. den. 421 U.S. 946 (1975). In Jenkins, Judge Friendly traced the historical underpinnings and constitutional logic of the citizen's protection against double jeopardy oriented around the ultimate issue in each of those cases -- the government's right to appeal from a judgment in the defendant's favor.

The case at bar, however, is distinguishable on this issue from both Jenkins and Velasquez in that the issue on which jeopardy is here claimed was one of fact which was before the jury under the indictment until the end of the case when the issue was withdrawn from the jury's consideration by a ruling of the trial judge. The judge ruled that the government had failed in its proof and accordingly the jury could not find the defendant Young guilty of either conspiring with defendant Chin to bring a weapon described as AR 180, S-12590 into the state of New York from outside the state or from effecting the substantive crime (at a time when she and Chin were allegedly both residents of the state of New York).

The government in its brief below filed with this Court in opposing defendant Young's application for a stay of the trial stated:

> ". . . the United States would not dispute, for purposes of this motion, that jeopardy would have attached had the Court dismissed a count of the indictment, involving solely this particular gun. However, this Court, sua sponte, and for the stated purpose of avoiding any post-trial speculation as to the basis for a conviction, prophylactically

> instructed the jury to disregard some of the evidence relating to one part of one of the counts." (Brief p. 7)

The government here is relying on the fact that it inartfully drew the first indictment which lumped together as one offense the charged violations of law concerning four different weapons. After the trial court had made its finding that the government had failed in its proof as to one weapon, the government then stated it was not barred from re-presenting evidence to a new jury concerning that weapon in a separate new count. In Jenkins the Supreme Court stated:

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not a resolution of the factual issues against the government." 420 U.S. at 370.

In the case at bar the trial court was clearer -- it found that the government had failed in its proof on that issue. The teaching of Jenkins is relevant on this issue: it matters not what the trial court calls it if the effect is to rule out any possibility of conviction on a certain set of facts and to take the issue from the jury. Such action amounts to an acquittal.

Said this Court in Velasquez:

> "The present law of double jeopardy precludes retrial in instances when, regardless of the label, the trial court has ruled in favor of the defendant on facts going to the merits of the case if these facts were adduced at trial (United States v. Sisson, supra); if they were presented at an evidentiary hearing (United States v. Southern R. Co., 485 F.2d 309, at 312 (4th Cir., 1973); or if they were stipulated by the parties (United States v. Brewster, 408 U.S. 501, 506, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972); United States v. Sisson, supra at 285 of 339 U.S. . . . .

. . . . . .

> "The underlying thrust of the protection against double jeopardy is thus not to limit the number of times a defendant may be summoned into court on a single offense. Under present law this may be done repeatedly. It is rather to limit to one the number of times that a defendant may be required to submit proof of his innocence to challenge or acceptance by the other side. This expresses the root function of the trial as a proceeding where litigants are to be heard before a neutral tribunal, where they appear and argue as adversaries and where their case is to be subjected to public scrutiny and is open to rebuttal. It is multiple trials in this sense which the double jeopardy clause is designed to prevent." (footnotes omitted) (emphasis supplied) (990 F.2d at 34)

Moreover, as has been noted frequently by this Court as well as others that it is "fundamental that a defendant, once acquitted, may not again be placed in jeopardy for the alleged crime. Fong Foo v. United States, 389 U.S. 141 . . . (1962), Kepner v. United States, 195 U.S. 100 . . . (1905), United States v. Ball, 163 U.S. 662 . . . (1896)." (Judge Kaufman in Velasquez (dissent)(490 F.2d at 39.) See also Green v. United States, 355 U.S. 184 (1957); cf. United States v. Hill, 473 F.2d 759 (9 Cir. 1972); United States v. Kehoe, 516 F.2d 78 (5 Cir. 1975).

## POINT II

THE JURY VERDICT OF NOT GUILTY OF CONSPIRACY TO VIOLATE 18 U.S.C. §922 (a) 3 AS A CO-CONSPIRATOR WITH CO-DEFENDANT CHIN, NECESSARILY DECIDED FACT ISSUES FAVORABLY TO DEFENDANT YOUNG. THE GOVERNMENT IS THEREAFTER BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL FROM RELITIGATING ANY OF THESE ISSUES IN A SUBSEQUENT PROSECUTION OF THAT DEFENDANT.

When the jury found the defendant Young not guilty of conspiring with Kenneth Chin between July 29, 1975 and October 4, 1975 to violate the weapons law, the jury expressly had to find that the two defendants had no agreement whatsoever that concerned the illegal transportation of weapons. This was impliedly a finding that neither one nor the other had aided or abetted the other in violating the weapons law.[5]

Since the defendant Young presented affirmative evidence that she quarreled with defendant Chin, returned to her parents' home in Hanford, California on a one-way airplane ticket, looked for work and registered to receive unemployment assistance, the jury must have found that those facts were true

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5. Indeed, in its brief below, the government stated:

> "It may well have been (in fact it is more likely than not, it is submitted) that the jury's verdict was based on the Government's failure to prove beyond a reasonable doubt an agreement between Young and her co-defendant." (p. 13)

And again:

> ". . . it is not unreasonable at all to assume that the jury acquitted on Count One because they were not convinced that an agreement had existed . . . " (p. 15)

and accordingly that the defendant Young had at least temporarily broken up her close relationship with defendant Chin.

These favorable inferences must have been drawn by a jury as against the uncontroverted evidence that defendant Young purchased one of the weapons in California on July 29, 1975 (AR 180 S-12585) and that the weapon and two others were found in an apartment in New York exclusively occupied by defendants Chin and Young on October 4, 1975.

Since all these inferences, and more, were favorable to defendant Young she could not be required to face a retrial in which she had to prove again that she had not acted in concert with defendant Chin to violate the weapons law. As stated in Ashe v. Swenson, 397 U.S. 436, 443 (1970):

> "It [Collateral Estoppel] means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future law suit."

Instead at the trial, having pleaded double jeopardy and collateral estoppel, she tried a second time to introduce the same evidence of her break with defendant Chin and at the second trial the court ruled that she could not even assert this defense this time around. Thus, not only did she not get the advantage of the prior favorable ruling, but she was precluded from presenting all the facts to the jury and the jury was permitted to make a finding that defendants Young and Chin knowingly (and together) wilfully transported the weapons from

California to New York in violation of the weapons law.

The Ninth Circuit in a case involving a reverse application of the doctrine of collateral estoppel, United States v. Colacurcio, 514 F.2d 1, 6 (9 Cir. 1975), defined the doctrine by reference to 1B Moore's Federal Practice:

> "The issue to be concluded must be the same as that involved in the prior action. In the prior action, the issue must have been raised and litigated, and actually adjudged. The issue must have been material and relevant to the disposition of the prior action. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment."

This Court had occasion to apply the doctrine of collateral estoppel to a set of facts which highlighted the distinction between res judicata, collateral estoppel and broad double jeopardy considerations in United States v. Kramer, 289 F.2d 909 (2 Cir. 1961).

In Kramer, the defendant had been acquitted of substantive crimes arising from two post office burglaries. The new indictment charged conspiracy to break and enter with intent to commit larceny and conspiracy to conceal and convert money and things of value stolen from the Post Office. Another count charged Kramer with receiving and concealing property from the Post Office.

Judge Friendly, speaking for this Court, held that the Double Jeopardy clause did not preclude a subsequent prosecution on issues not raised in the prior criminal proceeding, but

collateral estoppel precluded the government from relitigating issues necessarily determined in the earlier trial.

The test as to how collateral estoppel or res judicata applies to a subsequent prosecution in a criminal case is there broken down into two phases:

(1) What did the first judgment determine? (to be ascertained by looking to the record of the prior trial), and

(2) How does that determination bear on the second case?

Said this Court at pp. 915, 916:

> "A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue.
>
> . . . . . .
>
> "More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment . . . and still longer before the proliferation of statutory offenses deprived it of so much of its effect.
>
> . . . . . .
>
> "The very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar. The Government is

> free, within the limits set by the Fifth Amendment, see United States v. Sabella, 2 Cir 1959, 272 F.2d 206, 211, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charges by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be."

Thus based upon the analysis in Kramer and viewed narrowly, the government in the case at bar was precluded from presenting to the jury at the second trial any issue which the jury expressedly or impliedly considered and decided when it found the defendant Young not guilty of the charge in Count I of the indictment which read:

COUNT I

> On or about and between July 29, 1975 and October 4, 1975 within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, did knowingly and wilfully conspire to commit an offense against the United States, namely, to obtain firearms in Los Angeles, California, to wit: a U.S. M1 carbine, Serial Number 5487136; an Armalite AR 7 rifle, Serial Number 89474; an Armalite 180 rifle, Serial Number 12585; and to transport said firearms from Los Angeles, California into Brooklyn, New York, the State where the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG did then reside, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG not being licensed importers, manufacturers, dealers, or collectors, of said firearms, in violation of Title 18 United States Code, Section 922(a)(3).
>
> In furtherance of said unlawful conspiracy and to further the objects thereof, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG did commit the following:

OVERT ACTS

> 1. On or about July 29, 1975, the defendant ELIZABETH JANE YOUNG purchased a firearm, Serial Number

S-12585 from Coles Sporting Goods, 1030 South La Brea Street, Inglewood, California.

2. On or about October 4, 1975, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, did possess at 925 Union Street, Brooklyn, New York, Apartment 4B, four (4) firearms, Serial Numbers 5487136, 89474, S-12585, (Title 18 United States Code, Section 371).[6]

From a reading of the foregoing, it is clear that the jury found that there was no unlawful conspiracy between defendants Chin and Young of any kind whatsoever. Thus, evidence as to the two overt acts which included the purchase of a rifle by defendant Young in California on July 29, 1975 and the possession of three rifles on October 4, 1975 in the defendant's apartment in Brooklyn, New York could not be shown again to reflect any unlawful conspiracy or agreement between the two defendants to do or to have done anything illegal with those weapons.

Any suggestion to a new jury that there was an unlawful agreement between the two of them or that one or the other aided or abetted the other of the two, was legally barred by the doctrine of res judicata and collateral estoppel.

Similarly, since the jury must have found the absence of an agreement between the defendants to be based on the evidence of a quarrel between them and, further, evidence that the defendant Young changed her residence from New York to California, the

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6. Evidence as to the Kondo weapon (AR 180 S-12590) had already been stricken from the jury's consideration.

issue of the quarrel and its significance (change of residence) cannot again be put to a new jury because of res judicata and collateral estoppel.

Thus, if defendant Young could be retried at all on any of the issues in the new indictment, the court would have to take from the jury any considerations which suggested joint illegal action of the defendants, or any considerations that defendant Young had not had a bona fide intent to change her residence from New York to California. In this regard, it was further improper for the evidence as to her (and his) continuing residence in New York through 1974 and 1975 to be presented where another jury had heard it and decided that, at least during that period and in July and August 1975, she had changed her residence sufficiently for it to signify a break in relationship with defendant Chin.

This Court may well ask: what was left to be adjudicated? As is set forth in Point III below, defendant Young asserts that there could be no retrial on the issues involved after her prior acquittal.

## POINT III

THE PROSECUTION WAS BARRED BY DOUBLE JEOPARDY FROM TRYING DEFENDANT YOUNG UNDER THE SUPERSEDING INDICTMENT BECAUSE BOTH THE CONSPIRACY TRIAL (WHERE DEFENDANT WAS ACQUITTED) AND THE SECOND TRIAL ON THE SUBSTANTIVE CRIME INVOLVED THE SAME EVIDENCE.

In this particular case, the government's theory and evidence on both the conspiracy count and the substantive crime of violation of 18 U.S.C. §922 (a) 3, were the same.

The evidence adduced by the government at both trials was identical on the issues tendered. At the second trial, additional and cumulative evidence was presented on the issue of defendant Young's continuing residence in New York (Con Edison and Telephone Company computer read-outs indicating that the service at 925 Union Street, Brooklyn, New York was continuously in the name of Elizabeth Young from 1974 to the present). Other similar evidence as to the lease and post office change of address forms had been introduced at the first trial and was reintroduced at the second trial.

Under standards set forth by this Court in Kramer, the case at bar met the "same evidence" test, i.e.:

> "Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct: they are the 'same' only when 'the evidence to support a conviction upon one of them [the indictments' would have been sufficient to warrant a conviction upon the other [citing cases]." at p. 913

The real theory of the government in this prosecution

was that the two defendants while continuously residing in Brooklyn, New York, conspired and agreed to go together (or for one of them to go on behalf of both) to California for the purpose of obtaining weapons and bringing them into New York where they lived. This was the theory of the prosecution at both trials and was reflected in the court's charge to the jury, of which the following are excerpts which show how inextricably the court connected defendant Young with defendant Chin:

> "On the other hand, if you find this situation, that the defendant Young was a resident of California at the time she transported a weapon into the State of New York -- and I make no finding that she transported any weapon into the State of New York -- that's for you to determine and you must determine whether the Government proved that beyond a reasonable doubt -- but assuming that you find that she transported a weapon into the State of New York and at that time she was a resident of California but at that time the defendant Chin was a resident of the State of New York and that he aided and abetted -- as I will define that later -- the transportation into the State of New York and that he received a weapon while he was a resident of the State of New York that was transported from outside the State, then the mere fact that you must find the defendant Young not guilty by reason of failure to prove residence does not exculpate Mr. Chin because he doesn't benefit by her non-residence.
>
> "In order to prove the accused guilty of counts 1, 3, 5 and 7, which are the counts charging transportation by a resident of the State of New York, the following essential elements of crime must be proven:
>
> "One, that the accused, at the times mentioned, was not a licensed importer, manufacturer, dealer or collector of firearms;
>
> "Two, that on or about the dates alleged the defendant purchased or otherwise obtained a firearm described in the particular count of the indictment;

"Three, that on or about the dates alleged the defendant knowingly transported the firearm into the State of New York, and,

"Four, that at the time the defendant transported the firearm into the State of New York, the defendant was a resident of the State of New York.

"The Government must prove all those four elements by proof beyond a reasonable doubt.

"Now, thus far, I have not yet touched on the proof in the record or the lack of proof in the record and I will say now there is no proof in the record that the defendant Chin transported any weapon into the State of New York.

"The proof is clear in the record that he was not in California. However, I will come to the aiding and abetting statute and you will consider whether he violated Section 2, which, I repeated eight times and that is the aiding and abetting statute.

". . . Section 2 of Title 18 . . . provides this:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

"So, the defendant Chin here is charged with aiding and abetting the transportation of the weapon or weapons.

"In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would if it were something he wished to bring about. In other words, that he do it knowingly and voluntarily and not by pure accident.

"An act is willfully done voluntarily and intentionally and with specific intent to do that which the law forbids.

"Of course, you may not find an accused guilty of aiding and abetting the commission of a crime unless you find that the crime was committed, that all the essential elements of the crime were established.

"The law recognizes also that possession may be sole or joint. . . .

"But for these purposes it doesn't matter as to the type of possession. If you find from the evidence in this case beyond a reasonable doubt that the weapons made the subject of the counts in this indictment were in the knowing possession of the defendants and you find that the particular weapon -- referring to the ones described in the counts -- the four weapons described in the eight counts of the indictment -- if you find that the weapons were brought into the State of New York from outside the State of New York, then you may infer from your finding of possession that the accused participated in the unlawful transportation." (emphasis supplied) (I1 783, 784, 793, 794)

In so instructing the jury, the court below permitted the jury to find defendant Young guilty through her association with Chin. The jury could find Chin guilty as an aider and abettor even if it found that Young was a resident of California. Then (with some degree of inconsistency), the jury was told that Chin could not be found guilty unless a crime had been committed. But, finally, the guilt of both defendants could be predicated on inferences which could be drawn from their unlawful possession of the weapons found in the apartment.

Thus, when the jury found the defendant Young guilty along with the defendant Chin at the second trial, it did so on the same evidence which another jury had acquitted her of [the conspiracy count] and on which it had otherwise failed to agree.

The standard of the "same evidence" was definitively discussed in Sealfon v. United States, 332 U.S. 575 (1948). Sealfon holds with the general rule that a person may be tried and convicted for both conspiracy and a substantive offense -- that they are separate and distinct offenses. Cf. Pierera v. United States, 347 U.S. 1 (1954), but puts a further gloss on that rule.

In Sealfon, the defendant was tried first on a conspiracy charge to defraud the government in a scheme to file a false invoice concerning a sugar rationing law. After the defendant's acquittal on the conspiracy charge, he was tried on the substantive offense of uttering the false invoices. The issue there -- similar to the one in the case at bar was "whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction."

Said the court there, with particular applicability to the case at bar:

> "The instructions under which the verdict was rendered, however, must be set in a practical frame and reviewed with an eye to all the circumstances of the proceedings. . . . So interpreted, the earlier verdict precluded a later conviction of the substantive offense. The basic facts of each trial were identical. . . . Thus, the core of the prosecutor's case was in each case the same. . . . There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement. . . . It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do." (322 U.S. 579, 580)

Recently, the Eighth Circuit had made a similar holding in United States v. Schaeffer, 510 F.2d 1307, 1313 (8 Cir. 1975) cert. den. 95 S.Ct. 1975, 1980. See United States v. Cohen, 197 F.2d 27 (3 Cir. 1952).

Finally, Judge Friendly, in United States v. Sabella, 272 F.2d 206, 212 (2 Cir. 1959) developed for this Circuit a rationale for the proscription of successive prosecutions on successive indictments even though under a different law:

> "The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation there can be no further prosecution of that fact situation alone. The defendant may not later be tried again on that same fact situation, where no significant additional fact need be proved, even though he may be charged under a different statute. He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. Here there was one sale of narcotics. The government should have but one opportunity to prosecute on that transaction. Although in such a prosecution it may join other charges based on the same fact situation it may not have a succession of trials. . . ."

## CONCLUSION

The order denying the motion should be reversed and the indictment dismissed.

August 3, 1976

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Defendant-Appellant ELIZABETH JANE YOUNG CHIN

# APPENDIX

PAGINATION AS IN ORIGINAL COPY

# DOCKET ENTRIES

ATES DISTRICT COURT — CRIMINAL DOCKET

'75 CR 851

Felony ☐ Offense ☐ emeanor ☐ | JUDGE/MAGISTRATE: Assigned Trial 0712 | Disp./Sentence | 207 1 District Office | • U.S. vs. YOUNG, ELIZABETH JANE now known as ELIZABETH JANE YOUNG — 2 defendant

Case Filed: Day 11 Mo. 11 Yr. 75 | Docket No. 851 | Def 2 | No. of Defnts 2 | MISHLER

CHI

IARGES

| U S CODE SECTION | OFFENSES | COUNTS |
|---|---|---|
| 18-371,922(a)(3) and 2 | Did conspire to obtain firearms not being licensed dealers, etc. | 2 |

MAGR CASE NO 75 M 1743

BAIL • RELEASE: ☐ Denied ☐ Personal Recog. ☐ Unsecured Bond ☐ Conditional Release — AMT Set (000) $ 25 10/6/75 date ☐ — ☐ 10% Depos. ☒ Surety Bon ☐ Collateral ☐ 3rd Party Custody ☐ PSA — ☐ Bail Not Made ☒ Bail Status Changed (See Docket)

EYS

U.S. Attorney or Asst: Gavin Scotti

Defense: ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ PD ☐ CD
Eleanor Jackson Piel
36 W. 44th St. New York, NY. 10036
682-8288

ST

ARREST: 10/6/75 or U.S. Custody Began on Above Charges ☐ Prosecution Deferred — ☐ High Risk Defn. & Date Designd.

INDICTMENT ☒ — Information ☐ 11-11-75 — Waived ☐ — ☒ Superseding Indict/Info ☐ 4/19/76

ARRAIGNMENT: 11-20-75 — 1st Plea — Final Plea 4/19/76

TRIAL: Voir Dire ☐ — Trial Set For 4/12/76 — XX Not Guilty ☐ Nolo ☐ Guilty — ☐ Not Guilty ☐ Nolo ☐ Guilty — Trial Began 4/12/76 ☐ N — Trial Ended 4/12/76

SENTENCE: Disposition 4-21-76 CYB — ☐ Acquitted ☐ Dismissed ☐ Nolled/Discontinued* — ☐ On All Charg ☐ On Lesser Offense(s) ☐ WOP: ☐ WF

| | | DATE | INITIAL/No. |
|---|---|---|---|
| Search Warrant | Issued | | |
| | Return | | |
| Summons | Issued | | |
| | Served | | |
| Arrest Warrant | | | |
| COMPLAINT | | 10/6/75 | VAC/070A |

INITIAL APPEARANCE — INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING — Date Scheduled 10/16/75 — Date Held — ☐ Waived ☐ Not Waived — ☒ Intervening Indictment

Tape No. — INITIAL/No

OUTCOME: ☐ Dismissed ☐ Held for District GJ — BOND: ☐ Exonerated ☐ To Transferee District — ☒ Held to Answer to U. S. District Court

AT: EDNY

Magistrate's Initials ▶ VAC/070A

OFFENSE (In Complaint): Conspiracy to violate Gun Control Act of 1968. T-18 USC Section 922(a)(3) and (6) and Section 371.

* Show last names and suffix numbers of other defendants on same indictment/information

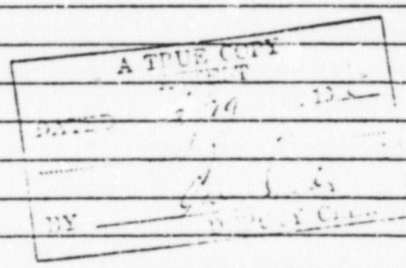
CHIN 1

| DATE | PROCEEDINGS | V. Excludable Delay (a) | (b) | (c) | (e) |
|---|---|---|---|---|---|
| 10/6/75 | William Liebovitz, Esq. (Ret) 51 East 42nd Street NY 10017 | | | | |
| 10-8-75 | AUSA - Gavin Scotti. Bail reduced to $10,000 10% Cash - Hearing Adjourned to 10-28-75 at 2:00 PM - MS 070B - Bail made - Deft released. | | | | |
| 10/28/75 | Case adjourned to November 12, 1975 at 2:00 PM. | | | | |
| 11/11/75 | Indictment Filed. See 75 CR 851. (Before Costantino J) | | | | |
| 11-20-75 | Notice of Appearance filed. | | | | |
| 11-20-75 | Before BRAMWELL, J - case called - deft & counsel present - deft arraigned and after being advised of her rights and on her own behalf enters a plea of not guilty - bail conditions contd - Dec. 19, 1975 for all motions and to set a trial date. | | | | |
| 12/12/75 | Notice of motion to inspect, and to suppress filed ret. ret. 12/19/75 | | 2 12/12 | | E |
| 12/19/75 | Before MISHLER, CH.J.- Case called- Deft's motion to inspect sealed affidavit,etc. argued-Decision reserved. Adjd to 4/12/76 for trial | | | | |
| 12/22/75 | Certificate of engagement filed-trial set for 4/12/76 | | | | |
| 1-12-76 | Second Memorandum of Law filed in support of deft Young's motion for complete disclosure, and to suppress the fruits of an illegal search, etc. | | | | |
| 1-12-76 | Notice of Motion filed for severance etc. | | | | |
| 1/26/76 | Letter from Judge Mishler, granting extention to 1/29/76 to time to file answering affidavits filed | | | | |
| 1-29-76 | Affidavit of Neil Findley filed. | | | | |
| 1-29-76 | Letter dated Jan. 28, 1976 filed to Chief Judge Mishler from Edward Korman, Chief Asst. U.S. Atty. | | | | |
| 2/9/76 | Reply memorandum filed | | | | |
| 2-20-76 | Letter filed dated 2-18-76 received from Chambers and retd as directed. | | | | |
| 2/23/76 | By MISHER,CH.J.- Memorandum of Decision and Order filed denying motion to suppress | | | | |
| 3-17-76 | Govts Notice of Readiness for Trial filed | | | | |
| 4/9/76 | Notice of motion for disclosure of list of all prosecutions brought pursuant to T-18,U.S.C. Sec. 922(a)(3), etc. | | | | |
| 4-12-76 | Before MISHLER, CH J - case called - deft & atty present - On motion of deft Young the caption is amended to read Kenneth Raymond Chin and Elizabeth Jane Young ~~Chinx~~ now known as Elizabeth Jane Young Chin. ~~Nxxxingx~~Trial ordered and begun as to deft Elizabeth Jane Young Chin - Jurors selected and sworn - severance motion granted as to deft Kenneth Raymond Chin. Trial contd to 4-13-76 | | | | |
| 4-13-76 | Before MISHLER, CH J - case called - deft & counsel Eleanor Jackson Piel present - trial resumed - Motion by the deft for Judgment of Acquittal is denied - trial contd to 4-14-76 | | | | |

| | |
|---|---|
| 4/14/76 | Before MISHLER,CH.J.- case called- deft and counsel present- trial resumed- deft rests- motion to dismiss denied- ~~xxxxxx~~ trial contd to 4/15/76 at 10:00 A.M. |
| 4/15/76 | Before MISHLER,CH.J.- Case called- deft and counsel present- trial resumed- jury retires for deliberation jury retd and rendered a verdict of not guilty on count 1 and asked to suspend for day and return tomorrow for further deliberations on count 2- trial contd 4/16/76 at 10:00 A.M. |
| 4/15/76 | By MISHLER,CH.J.- Order of sustenance filed |
| 4-16-76 | 3 stenographers transcripts filed (2 dated 4-12-76 and one dated 4-13-76) |
| 4-16-76 | Before MISHLER, ,CHJ - case called - deft & atty present - trial resumed - Jury retired for deliberations at 10:00 am on count 2 - at 12:25 PM Jury returned and informed the court that they are unable to reach a verdict on count 2- court declared a mistrial on count 2 - jury discharged - trial concluded. |
| 4-16-76 | Notice of motion filed received from Chambers with affidavit that the prosecution under 18-922 is a discriminatory prosecution in violation of due process clauses, etc. |
| 4-19-76 | Stenographers transcript filed dated 4-16-76 |
| 4-19-76 | SUPERSEDING INDICTMENT FILED (S) |
| 4-19-76 | Before MISHLER, CH J - case called - deft & attys present - deft arraigned and enters a plea of not guilty - same bail as in ~~indictment~~ in 75 CR 851. |
| 4/21/76 | Notice of readiness for trial on superseding indictment filed- |
| 4/21/76 | Letter from William Leibovitz dated 4/20/76 filed |
| 4/21/76 | Letter from Judge Mishler dated 4/21/76 filed |
| 4/30/76 | Stenographers Transcript dated 4/15/76 filed |
| 5-3-76 | Letter filed received from Chambers dated 4-28-76 that the period of time between May 4 and June 21, 1976 is excludable time under this Court's rule concerning speedy trial. |
| 5/10/76 | Notice of motion to dismiss filed |
| 6-7-76 | Govts Memorandum of Law filed. |
| 6-16-76 | By MISHLER, CH J - Memorandum of Decision and Order filed denying motion of deft Elizabeth Young for dismissal of the superseding indictment . |
| 6-18-76 | Notice of appeal filed (from denial of above motion) |
| 6-18-76 | Docket entries and duplicate of notice mailed to the court of appeals. |

| | |
|---|---|
| 6-22-76 | By Mishler, Ch J - Order filed pursuant to 18:6002 and 6003 the said Michael Yanagita give testimony and provide other information, etc.; motion of Michael Yanagita re electronic surveillance filed (recvd from Chambers and retd as directed. argued and denied; motion of Marc Kondo re electronic surveillance filed; argued and denied. motion to quash subpoena served upon Marc Kondo argued and denied; affirmation of counsel James Reif filed. |
| 6-21-76 | Before Mishler, ch J - case called - deft & counsel present-trial ordered and Begun - Jurors selected and sworn - motion to quash subpoena served upon Marc Rondo is denied-trial contd to June 22, 1976 at 10:00 am.motion of Marc Kondo re electronic surveillance argued and dnied ; motion of Michael Yanagita re electronic surveillance argued and denied. |
| 6-22-76 | Notice of appeal filed. |
| 6-22-76 | Docket entries and duplicate of notice mailed to the court of appeals. |
| 6-22-76 | By MISHLER, CH J - Order of commitment filed (MICHAEL K. YANAGITA) |
| 6-22-76 | By MISHLER, CH J - Order of commitment filed (MARC CHOYEI KONDO) |
| 6-22-76 | Before MISHLER, CH J - case called - deft & counsel present-trial resumed - witness Yanagita resumed the witness stand and again refused to answer any questions - witness was again held in contempt of court - witness committed to MCC for 1 month or to the time of verdict in the case on trial which ever comes first. Execution of commitment stayed until 2:00 PM June 22, 1976 - motion by deft for mistrial is denied - stay of witnesses Yanagita & Kondo extended to June 23, 1976 by 11:00 am - trial contd to 6-23-76. |
| 6-23-76 | Before MISHLER, CH J - case called - deft & counsel present - trial resumed - Govt rests - motion by deft for Judgment of Acquittal is denied Witness Michael Yanagita remanded to MCC. Bench Warrant ordered for deft KONDO - trial contd to June 24, 1976 |
| 6-24-76 | Before MISHLER, CH J - case called -deft & atty present - trial resumed - deft Elizabeth Young Chin rests - defts renew motion for judgment of acquittal denied - trial contd to June 25, 1976. |
| 6-24-76 | By MISHLER, CH J - Order to show cause filed, ret. July 2, 1976, why an order should not be made adjudging said Marc Kondo in contempt,etc. |

| | |
|---|---|
| 6-24-76 | By MISHLER, CH J - Order to show cause filed, ret.July 2, 1976, why an order should not be made adjudging said Michael Yanagita in contempt, etc. with proof of service |
| 6-25-76 | Before MISHLER, CH J - case called - deft & counsel present - trial resumed - ~~XXXXX~~ at 12: 30 PM the Jury retired for deliberations - at3:30 P the Jury returned with a verdict of guilty on counts 1 to 4 as to deft Kenneth Raymond Chin and not guilty on counts 5 to 8 incl. Jury polled & discharged - trial concluded - Memo of verdict signed by the foreman ordered filed - all motions reserved to time of sentence - sentencing date set for 9-17-76 |



NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA

-against-

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG a.k.a.
ELISABETH JANE YOUNG CHIN

Defendants.

---

75 CR 851

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the defendant, ELIZABETH JANE YOUNG CHIN, appeals to the Court of Appeals for the Second Circuit that certain order and decision of JUDGE JACOB MISHLER entered on June 16, 1976, denying her motion to dismiss the superceding indictment against her on the grounds of double jeopardy, and on all other grounds including a continuing deprivation of due process of law.

New York, N.Y.
June 18, 1976

Yours,

ELEANOR JACKSON PIEL
Attorney for ELIZABETH
JANE YOUNG CHIN

36 West 44th Street
New York, N.Y. 10036
212/682-8288

To
ETHAN LEVIN-EPSTEIN ESQ.
Assistant United States Attorney
Eastern District of New York
Brooklyn, New York 11201

# FIRST TRIAL INDICTMENT

RJD:GWS:ms UNITED STATES DISTRICT COURT
T. 753, 538 EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA :

- against - :

KENNETH RAYMOND CHIN and :
ELIZABETH JANE YOUNG,

Defendants. :

- - - - - - - - - - - - - - - - - - - - X

INDICTMENT

Cr. No. 75 CR 551

T.18 U.S.C. §§371, 922(a)(3) & 2

11-11-75

THE GRAND JURY CHARGES:

## COUNT I

On or about and between July 29, 1975 and October 4, 1975 within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, did knowingly and wilfully conspire to commit an offense against the United States, namely, to obtain firearms in Los Angeles, California, to wit: a U.S. M1 carbine, Serial Number 5487136; an Armalite AR 7 rifle, Serial Number 89474; an Armalite 180 rifle, Serial Number 12585; and an Armalite AR 180 rifle, Serial Number S-12590, and to transport said firearms from Los Angeles, California into Brooklyn, New York, the State where the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG did then reside, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG not being licensed importers, manufacturers, dealers, or collectors,

of said firearms, in violation of Title 18 United States Code, Section 922(a)(3).

In furtherance of said unlawful conspiracy and to further the objects thereof, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG did commit the following:

OVERT ACTS

1. On or about July 29, 1975, the defendant ELIZABETH JANE YOUNG purchased a firearm, Serial Number S-12585 from Coles Sporting Goods, 1030 South La Brea Street, Inglewood, California.

2. On or about October 4, 1975, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, did possess at 925 Union Street, Brooklyn, New York, Apartment 4B, four (4) firearms, Serial Numbers 5487136, 89474, S-12585, and S-12590. (Title 18 United States Code, Section 371).

COUNT II

From on or about August 15, 1975 to October 4, 1975, the exact dates being unknown to the grand jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, both residing at 925 Union Street, Brooklyn, New York, Apartment 4B and not being licensed importers, dealers, or collectors, did knowingly and wilfully transport from California to Brooklyn, New York, four (4) firearms, namely, a U.S. M 1 carbine, Serial Number 5487136; an Armalite AR 7 rifle, Serial Number

89474; an Armalite AR 180 rifle, Serial Number S-12585; and an Armalite AR 180 rifle, Serial Number S-12590 which firearms were purchased in the State of California by the defendants.

(Title 18 United States Code Sections 922(a)(3) and 2.

FOREMAN

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

SECOND TRIAL INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

KENNETH RAYMOND CHIN, and
ELIZABETH JANE YOUNG, now
known as "Elizabeth Jane
Young Chin",

Defendants.

- - - - - - - - - - - - - - - - - X

SUPERSEDING INDICTMENT

Cr. No. 75 CR 851 (s)
(Title 18, U.S.C. §§922(a)(3)
2)

THE GRAND JURY CHARGES:

COUNT ONE

From on or about July 29, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully transport, from California to New York, a firearm, to wit: an Armalite, AR-180, .223 caliber, semi-automatic rifle, serial number S-12585 which firearm had been purchased or otherwise obtained in California by the defendants. (Title 18, United States Code, Sections 922(a)(3) and 2).

COUNT TWO

From on or about July 29, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully recieve in New York, a firearm, to wit: an Armalite, AR-180, .223 caliber, semi-automatic rifle, serial number S-12585 which firearm had been transported from California to Brooklyn, New York by the defendants, after it had been puchased or otherwise obtained by them in California. (Title 18, United States Code, Sections 922(a)(3) and 2).

COUNT THREE

From on or about August 12, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully transport, from California to New York, a firearm, to wit: an Armalite, AR-180, .223 caliber, semi-automatic rifle, serial number S-12590 which firearm had been purchased or other-

wise obtained in California by the defendants. (Title 18, United States Code, Sections 922(a)(3) and 2).

COUNT FOUR

From on or about August 12, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully receive in New York, a firearm, to wit: an Armalite, AR-180, .223 caliber, semi-automatic rifle, serial number S-12590 which firearm had been transported from California to Brooklyn, New York by the defendants, after it had been purchased or otherwise obtained by them in California. (Title 18, United States Code, Section 922(a)(3) and 2).

COUNT FIVE

From on or about July 1, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully transport, from California to New York, a

firearm, to wit: an Armalite, AR-7, .22 caliber, semi-automatic rifle, serial number 89474 which firearm had been purchased or otherwise obtained in California by the defendants. (Title 18, United States Code, Sections 922(a)(3) and 2).

COUNT SIX

From on or about July 1, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully received in New York, a firearm, to wit: an Armalite, AR-7, .22 caliber, semi-automatic rifle, serial number 89474 which firearm had been transported from California to Brooklyn, New York by the defendants, after it had been purchased or otherwise obtained by them in California. (Title 18, United States Code, Section 922(a)(3) and 2).

COUNT SEVEN

From on or about July 1, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed im-

porters, dealers, manufacturers or collectors, did knowingly and wilfully transport, from California to New York, a firearm, to wit: an M-1, .30 caliber Carbine, serial number 5487136 which firearm had been purchased or otherwise obtained in California by the defendants. (Title 18, United States Code, Section 922(a)(3) and 2).

COUNT EIGHT

From or about July 1, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully receive in New York, a firearm, to wit: an M-1, .30 caliber Carbine, serial number 5487136 which firearm had been transported from California to Brooklyn, New York by the defendants, after it had been purchased or otherwise obtained by them in California. (Title 18, United States Code, Sections 922(a)(3) and 2).

A TRUE BILL

_____
FOREMAN

_____
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

OPINION OF COURT BELOW DENYING MOTION TO DISMISS SUPERSEDING INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -

75 CR 851

UNITED STATES OF AMERICA .

-against-

Memorandum of Decision and Order

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG,

Defendants.

June 16, 1976

- - - - - - - - - - - - - - - - - - -

MISHLER, CH. J.

Defendant Elizabeth Jane Young moves to dismiss the superseding indictment filed April 19, 1976, on the ground that the acquittal after trial of the conspiracy count (Count One), of the prior indictment, collaterally estops the government from prosecuting on the superseding indictment. Alternatively, she moves to dismiss Counts Three and Four of the superseding indictment on the ground that prosecution on those counts would violate her fifth amendment right not ". . . for the same offense to be twice put in jeopardy of life and limb."

On November 11, 1975, the grand jury returned indictment 75 CR 851, charging that on July 29, 1975, and October 4, 1975, defendant conspired with Kenneth Raymond Chin to transport four (4) firearms [1] from Los Angeles, California, to Brooklyn, New York, where Young and Chin allegedly resided, in violation of 18 U.S.C. §§371, 922(a)(3). Two overt acts were alleged: (1) the purchase of an Armalite rifle, serial number 12585; and (2) the possession of said four (4) firearms at 925 Union Street, Brooklyn, New York. Defendant and Chin were also charged with transporting the firearms from California to their residence in Brooklyn. Immediately prior to trial, the court granted the government's motion to sever the trials of Young and Chin. The government elected to proceed first against Young. The jury returned a verdict of not guilty on Count One and was unable to agree on a verdict on Count Two. The court thereupon declared a mistrial on Count Two.

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[1] The weapons were identified as a United States M-1 carbine, serial number 5487136; an Armalite AR 7 rifle, serial number 89474; an Armalite 180 rifle, serial number 12590; and an Armalite 180 rifle, serial number 12585.

The superseding eight-count indictment charges Young and Chin with the transportation and receipt of four firearms, i.e., an Armalite AR-180, serial number 12585; an Armalite AR-180, serial number 12590; an Armalite AR 7, serial number 89474; and an M-1 carbine, serial number 5487136.

During the trial of the first indictment, before charging the jury, the court struck the testimony concerning the Armalite 180 rifle, serial number 12590, on the ground that the government had failed to prove that Young had transported the weapon into New York.[2] Defendant contends that this ruling was a determination precluding further prosecution for transporting and receiving the weapon as charged in Counts Three and Four of the superseding indictment. The court's ruling striking the testimony was an evidentiary ruling only, and did not determine the guilt or innocence of Young with respect to the crimes charged; therefore, the ruling does not bar prosecution for importing and receiving the subject weapon

[2] The government's proof showed only that Coles Sporting Goods Store in California sold the gun to one Mark Choyei Kondo and that it was found in defendant's home when the said weapon and others were seized pursuant to a search warrant.

as charged in Counts Three and Four of the superseding indictment.

Defendant further contends that the acquittal on the conspiracy count was a finding against the government on the two issues presented in the superseding indictment as to each firearm, i.e., (1) transportation into the State of New York, and (2) receipt of the weapons by the defendants. [3]

In Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358 (1954), defendants were convicted of three counts of mail fraud and conspiracy to commit the substantive crimes. The Supreme Court indicated the extent to which double jeopardy protects a defendant from convictions of both conspiracy and the substantive crime upon which the conspiracy is based as follows:

> It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both (citations omitted). Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy.

Id. at 11, 74 S.Ct. at 364.

The original indictment narrowly limited the charges to transporting firearms into New York State by a

[3] The transportation charges are the odd numbered counts while the receiving charges are the even numbered counts.

resident of New York State,[14] and conspiring to transport the weapons into New York State (Count One). Defendant understood the specific issues involved in both counts.[15]

Proof of importation into New York State is not essential to prove the conspiracy charge. Proof that defendant was a resident of the State of New York at the time of the importation is an essential element of the substantive offense; for the conspiracy count, the government's burden on proof of residency was only to prove that the conspiracy contemplated that one of the conspirators be a resident of New York at the time of importation.

The not guilty verdict on the conspiracy count does not bar prosecution of the substantive counts charged in the superseding indictment, United States v. Zane, 495 F.2d 683, 691 (2d Cir. 1974); United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961).

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[14] Count Two was based on the specific act of violating 18 U.S.C. §922(a)(3) in that defendant was charged in the language of the section making it unlawful ". . . to transport into . . . the State where [s]he resides . . . any firearm purchased or otherwise obtained by such person outside that State . . . ."

[15] Defendant's counsel argued ". . . this is not a possession case . . . this is a case only concerning the illegal transportation of a firearm (Tr. p. 478)."

The motion to dismiss the indictment is in all respects denied, and it is

SO ORDERED.

U. S. D. J.

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.



Docket
No. 76-8279

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

*against*

ELIZABETH JANE YOUNG CHIN,

Defendant-
Appellant

*AFFIDAVIT OF SERVICE BY MAIL*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*The undersigned being duly sworn, deposes and says:*

*Deponent is not a party to the action, is over 18 years of age and resides at* 101 West 80th St., New York, N.Y. 10024

*That on* August 3, *19* 76 *deponent served the annexed*
APPELLANT'S BRIEF AND APPENDIX
*on* Hon. David Trager, U.S. Attorney for the Eastern District of New York
*attorney(s) for* Appellee
*in this action at* 225 Cadman Plaza East, Brooklyn, N.Y. two ies
*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office —official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

*Sworn to before me*

August 3, 1976

George Cohen

GEORGE COHEN
Notary Public, State of New
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1977

August De Fonse

The name signed must be printed beneath
AUGUST DE FONSE